IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 20TH AUGUST 2007 / 29TH SRAVANA 1929

RSA.No. 625 of 2007()

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AS.69/2004 of ADDL.DISTRICT COURT (ADHOC)-III, THALASSERY
OS.322/2001 of ADDL.MUNSIFF COURT, KANNUR

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APPELLANTS/APPELLANTS & PLAINTIFF 2 & 3

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1. MANNEMBETH RAVARIKANDI SULOCHANA,
   D/O KALLIYANI, ELAYAVOOR AMSOM,
   EDACHOVVA DESOM, KANNUR DIST.

2. ALAKKAT RAMESHAN, S/O KALLIYANI,
   ELAYAVOOR AMSOM,EDACHOVVA DESOM, KANNUR DIST.

BY ADV. SRI.V.RAMKUMAR NAMBIAR

RESPONDENTS/ RESPONDENTS/DEFENDANTS

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1. ALAKKAT JANARDHANAN, S/O KALLIYANI,
   KALADATH HOUSE, NEAR VETERINARY HOSPITAL,
   P.O.MUZHAPPALA, KANNUR DISTRICT.

2. ALAKKAT PADMAKSHI, D/O KALLIYANI,
   PARIKKAL HOUSE, NEAR DR.MOHAMMAD ALI'S RESIDENCE,
   CHAKKARAKKAL, P.O.MAMBA, KANNUR DISTRICT.

3. MANNEMBATH RAVARIKANDI BHASKARAN,
   PARAKANDY HOUSE, CHELORA AMSOM,DESOM,
   VATTAPOIL, P.O.AICHUR.

4. ALAKKAT VALSALAN, S/O KALLIYANI,
   PARAKANDY HOUSE, CHELORA AMSOM,DESOM,
   VATTAPOIL, P.O.AICHUR.

5. ALAKKAT MOHAN, S/O KALLIYANI,
   PARAKANDY HOUSE, CHELORA AMSOM,DESOM,
   VATTAPOIL, P.O.AICHUR.

6. THIRUVARATH SOUMINI, W/O LATE
   GANGADHARAN, KALADATH HOUSE, MUZHAPPALA,
   KANNUR DISTRICT.

7. THIRUVARATH SHANEES, S/O LATE
A.JANARDHANAN, KALADATH HOUSE, MUZHAPPALA,
KANNUR DISTRICT.

8. THIRUVARATH SHAMNA, D/O LATE
A.JANARDHANAN, KALADATH HOUSE, MUZHAPPALA,
KANNUR DISTRICT.

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 20/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**M.SASIDHARAN NAMBIAR,J.**

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R.S.A. NO.625 OF 2007

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Dated this the 20th day of August, 2007

JUDGMENT

Plaintiffs 2 and 3 in O.S.322/2001 on the file of Munsiff Court, Kannur are the appellants. Respondents are the defendants. Deceased first plaintiff is the mother and plaintiffs 2 and 3 and defendants 1 to 5 are the children. Plaintiffs instituted the suit seeking a decree for partition contending that three items of plaint schedule properties were jointly set apart to the share of the plaintiffs and defendants as per partition deed 49/1958 and it is in their joint possession and there are two houses in the plaint schedule properties and house in item No.1 is vacant and third respondent is residing in the house item No.3 and for the last several years plaintiffs have been demanding partition, but third respondent is evading it and they do not intend to continue joint possession and therefore they are entitled to get

their 3/8 shares separated. Third respondent filed a written statement contending that in 1999 first plaintiff mother released her undivided right over the plaint schedule property in favour of third respondent under Ext.B1 release deed dated 5.7.1999 and third respondent has therefore two shares in the plaint schedule properties and plaintiffs 1,3 and defendant No. 4 are residing in the house in item No.1 and the entire income from item No.1 is being taken by them and in item No.3 earlier there was a hut made of country bricks which was demolished and third respondent constructed a new house with his hard-earned money and he is residing therein and nobody made contribution for its construction and therefore the house is to be allotted to him without valuation. During the pendency of the suit, plainfiff died. After the death of first plaintiff, plaintiffs 2 and 3 claimed the right of first plaintiff under Ext.A2 will executed by deceased first plaintiff on 15.12.2001. Third respondent contended that Ext.A2

will was not executed by deceased first plaintiff and she had no right left with her to be bequeathed.

2.Learned Munsiff on the evidence of Pws.1 and 2, DW1 and Exts.A1 and A2 and Ext.B1 found that Ext.A2 Will claimed by appellants and Ext.B1 release deed claimed by third respondent are not valid. A preliminary decree for partition was passed directing division of plaint schedule properties into 7 equal shares and allotment of 2 such shares to plaintiffs. Finding that house in item No.3 was constructed by third respondent without contribution from other sharers and they did not object to the construction, learned Munsiff directed that at the time of division the house is to be allotted to third respondent without valuation. The preliminary decree and judgment challenged before District Court, Thalassery in A.S.69/2004 by plaintiffs 2 and 3. Third respondent filed a cross objection. Learned District Judge on reappreciation of evidence held

that as first plaintiff did not challenge Ext.B1 release deed , it cannot be ignored and Ext.B1 release deed is valid and first plaintiff had released her right in favour of third respondent and third respondent is entitled to get the share of first plaintiff mother also. Learned Munsiff also found that Ext.A2 will was not proved and therefore appellants are not entitled to the share of first plaintiff. The cross objection was allowed and the appeal is dismissed. It is challenged in the second appeal.

3. Learned counsel appearing for appellants argued that plaintiffs were unaware of Ext.B1 release deed before it was produced and in the plaint it was only pleaded that third respondent claimed some right under a document which was not executed by first plaintiff and in such circumstances there was no necessity to seek a decree to set aside Ext.B1 and courts below should have found that third respondent did not derive any right under Ext.B1 and on the death of first

plaintiff, her right devolved on appellants under Ext.A2 will.

4. On hearing the learned counsel, I do not find any substantial question of law involved in the appeal. As far as Ext.B1 release deed is concerned, it is a registered release deed executed by first plaintiff. First appellate court found that in the plaint itself existence of Ext.B1 was admitted and still plaintiffs did not seek a decree to set aside Ext.B1.. Even if it is taken that appellants were not aware of the details of the release deed executed by first plaintiff in favour of third respondent, being an executant first plaintiff cannot contend so. Moreover, even after filing of the written statement by third respondent claiming the share of first plaintiff under Ext.B1, plaintiffs did not seek a decree for declaration or to set aside Ext.B1. In such circumstance, as rightly found by first appellate court, plaintiffs are not entitled to ignore Ext.B1 and claim the share of the mother. Even if Ext.A2

is genuine, appellants cannot claim the share of first plaintiff, as under Ext.B1 it was released to the third respondent earlier. Courts below on the evidence found that execution of Ext.A2 will was also not proved. It is a findings of facts. In such circumstance, no substantial question of law is involved in the appeal. The appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

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W.P.(C).NO. /06

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JUDGMENT

SEPTEMBER,2006